

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**

Date: **8 April 2016**

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public redacted version of

**Decision on Defence request for disclosure of the audio recording of
Witness P-0963's interview**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64 and 67 of the Rome Statute ('Statute') and Rules 77 and 81 of the Rule of Procedure and Evidence ('Rules'), issues this 'Decision on Defence request for disclosure of the audio recording of Witness P-0963's interview'.

I. Procedural History and Submissions

1. On 1 April 2016, the defence team for Mr Ntaganda ('Defence') filed a request for disclosure of the audio recording of an interview conducted with Witness P-0963 in [REDACTED] ('Request').¹ The Defence submits that nothing in Articles 64(3)(c) and 67(1)(a) and (b) of the Statute permit the Office of the Prosecutor ('Prosecution') to withhold incriminatory material from the Defence on the basis that its contents are already known by other means.² It argues that, even where a transcript is disclosed, disclosure of the audio recording 'remains necessary, if only [...] to verify the accuracy of the transcript in case of doubt'.³ The Defence states that the recording is 'necessary' to, and forms an 'intrinsic part' of, preparations for cross-examination.⁴
2. On 5 April 2016, having been directed to do so,⁵ the Prosecution responded, opposing the Request ('Response').⁶ The Prosecution submits that it has fulfilled its disclosure obligations and that the statutory provisions mentioned by the Defence do not support its request.⁷ The Prosecution states that certain materials related to the interview were disclosed as incriminating 'in case it must rely on

¹ Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P-0963, ICC-01/04-02/06-1242-Conf.

² Request, ICC-01/04-02/06-1242-Conf, paras 6-7.

³ Request, ICC-01/04-02/06-1242-Conf, para. 8.

⁴ Request, ICC-01/04-02/06-1242-Conf, paras 10-11.

⁵ E-mail from Legal Officer of the Chamber to the parties on 3 April 2016 at 13:15.

⁶ Prosecution's response to the 'Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P-0963', ICC-01/04-02/06-1242-Conf, ICC-01/04-02/06-1251-Conf.

⁷ Response, ICC-01/04-02/06-1251-Conf, paras 17-21.

them' during the case, and that they relate to [REDACTED] rather than to the charges against the accused.⁸ The Prosecution argues that the Defence has failed to establish the materiality of the requested recording,⁹ and that the accuracy of the transcript of the interview is not in dispute.¹⁰ The Prosecution further submits that the Request is 'inexplicably late', noting that the transcript was disclosed on 11 December 2015.¹¹

3. On 6 April 2016, the Defence sought leave to reply in relation to two issues: (i) the Prosecution's 'erroneous' reliance on Rule 77 as a basis for adjudicating the Request; and (ii) the Prosecution's 'misrepresentation' of certain of the Defence submissions ('Request to Reply').¹² The Chamber granted the Defence leave to reply on the first of the two issues.¹³
4. On 7 April 2016, the Defence filed its reply ('Reply'),¹⁴ in which it draws a distinction between 'incriminatory' and 'Rule 77' material, and argues that [REDACTED] information which is disclosed as incriminatory should not be addressed under Rule 77.¹⁵

II. Analysis

5. In relation to the Request to Reply, the Chamber did not consider that it would be assisted by further submissions in relation to the second issue identified by

⁸ Response, ICC-01/04-02/06-1251-Conf, para. 20.

⁹ Response, ICC-01/04-02/06-1251-Conf, paras 22-25.

¹⁰ Response, ICC-01/04-02/06-1251-Conf, paras 27-29.

¹¹ Response, ICC-01/04-02/06-1251-Conf, para. 26.

¹² Request on behalf of Mr Ntaganda for leave to reply to 'Prosecution's response to the "Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P-0963"', ICC-01/04-02/06-1252-Conf.

¹³ E-mail from Legal Officer of the Chamber to the parties on 7 April 2016 at 07:45.

¹⁴ Reply on behalf of Mr Ntaganda to "Prosecution's response to the 'Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P-0963'", ICC-01/04-02/06-1255-Conf.

¹⁵ Reply, ICC-01/04-02/06-1255-Conf, paras 3-4. The Chamber notes that the Defence made certain further submissions in the Reply which exceed the scope of the authorised reply, including in relation to 'materiality', the potentially duplicative nature of the material and the applicable burden. These submissions have been disregarded.

the Defence. In relation to the first issue, the Chamber wishes to emphasise that, although leave to reply was granted in order to permit the Defence to clarify its position, the Defence should have clearly addressed the applicable legal regime in the Request.

6. The Chamber considers that neither the Request nor the Reply clearly indicate a sound legal basis upon which disclosure of the audio recording is sought, nor do they provide any authority for the Defence submission that the recording falls within the Prosecution's disclosure obligations.
7. The Chamber considers the Defence's submissions to be misplaced to the extent it contends that Article 64(3)(c) gives rise to an independent disclosure obligation, separate from Article 67(2) and Rules 76 and 77. The Chamber understands the Defence position to be that the materiality of the audio recording is irrelevant because the interview in question was disclosed as incriminatory, rather than because it is material to the preparation of the Defence.
8. Although the Defence itself fails to invoke Rule 77, and in fact argues against its applicability, the Chamber observes that Rule 77 provides alternate bases of disclosure, namely: (i) materiality to the preparation of the defence; (ii) the Prosecution's intention to rely on the material as evidence at trial; or (iii) that the material was obtained from, or belonged to, the accused. The Chamber observes that the alternate bases for disclosure provided for in Rule 77 are not necessarily mutually exclusive and that, for example, information which is material to the preparation of the defence may simultaneously be potentially incriminating. In this instance, although the content of the interview does not relate to the substantive charges against the accused, the Chamber notes that the

transcripts of the interview were added to the Prosecution's List of Evidence on 15 January 2016.¹⁶

9. Consistent with prior jurisprudence of the Court, the Chamber considers that when audio recordings of statements have been transcribed, and those transcripts disclosed, the audio recordings need not, in principle, also be disclosed, as both the transcripts and the audio recordings contain the same record of words used.¹⁷ Despite the absence of such a general obligation, the Chamber considers that such audio recordings may be subject to disclosure if they are deemed material to the preparation of the defence. In this instance, the Defence has raised only a hypothetical argument regarding the use of the audio recording to 'verify' the content of the transcripts, without identifying any specific aspect in which the transcripts in question appear to be inadequate or any additional purpose to inspection of these particular audio recordings. The Chamber therefore finds that the Defence has failed to establish the *prima facie* materiality of the requested audio recordings.

¹⁶ ICC-01/04-02/06-1248-AnxA, page 238.

¹⁷ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Transcript of hearing dated 16 September 2014, ICC-01/09-01/11-T-137-Red-ENG WT, page 16, lines 20-22. *See also Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Defence requests for further disclosure, 9 March 2016, ICC-01/05-01/08-3336, para. 33; *Prosecutor v Germain Katanga and Mathieu Ngudjolo*, Decision on Application by the Defence for Germain Katanga for Disclosure of Audio Records of Interview of Witness P-129, 30 August 2010, ICC-01/04-01/07-2309-Red, paras 3-4 (it is noted that this decision concerned disclosure of audio recordings in circumstances where only a signed statement, rather than a word-for-word transcript, had previously been disclosed).

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

DIRECTS the parties to file public redacted versions of their filings (that is ICC-01/04-02/06-1242-Conf, ICC-01/04-02/06-1251-Conf, ICC-01/04-02/06-1252-Conf and ICC-01/04-02/06-1255-Conf) within two weeks of the date of this decision.

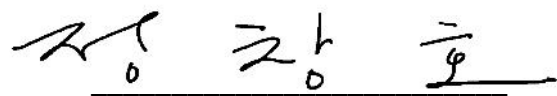
Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by 'remr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'K. Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of three distinct characters, written over a horizontal line.

Judge Chang-ho Chung

Dated 8 April 2016

At The Hague, The Netherlands